

HAWLEY LAKE HOMEOWNERS'	:	Order Granting Reconsideration and
ASSOCIATION,	:	Recalling Case From Hearings
Appellant	:	Division
	:	
v.	:	
	:	Docket No. IBIA 84-55-A
DEPUTY ASSISTANT SECRETARY--	:	
INDIAN AFFAIRS (OPERATIONS),	:	
Appellee	:	July 17, 1985

### ORDER

On March 21, 1985, the Board of Indian Appeals (Board) issued an order referring this case to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision. 13 IBIA 134 (1985). On April 15, 1985, the Board received a petition from the White Mountain Apache Tribe seeking reconsideration of that referral order. Appellee Deputy Assistant Secretary--Indian Affairs (Operations) filed a similar petition, which was received on April 30, 1985.

By order dated May 2, 1985, the Board acknowledged receipt of the petitions for reconsideration, stayed further action before Chief Administrative Law Judge (Indian Probate) Melvin J. Mirkin, and allowed appellant Hawley Lake Homeowners' Association an opportunity to respond to the petitions.

The Board has considered the petitions and appellant's response. The petitions are hereby granted, and the case is recalled. Judge Mirkin should immediately transmit the administrative record in this matter to the Board. This recall is to give the Board an opportunity to review the administrative record again. The Board will issue a decision if it determines that the case can be resolved as a matter of law. Should the Board determine, however, that an evidentiary hearing is needed, the case may be returned to Judge Mirkin.

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Jerry Muskrat  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

## CHIEF ADMINISTRATIVE JUDGE PARRETTE DISSENTING:

On the basis of the more comprehensive legal briefs that have now been submitted by the White Mountain Apache Tribe (tribe) and by appellee in support of their petitions for the Board's reconsideration of its order referring this matter to an Administrative Law Judge for hearing, I can readily understand the majority's desire to recall this case in order to ascertain whether it can simply be resolved on the basis of Federal Indian law alone. I cannot seriously fault my colleagues for wanting to reconsider the legal issues in light of what now seems clearly to be the weight of Federal authority. Indeed, the provision of the Administrative Procedure Act (5 U.S.C. § 554) providing for administrative hearings technically applies only to adjudications "required by statute to be determined on the record after opportunity for an agency hearing" (emphasis added); and the Department's regulations at 43 CFR 4.337(a) make referrals for hearings discretionary by the Board even where "the record indicates a need for further inquiry to resolve a genuine issue of material fact."

In this case, the known general facts do not appear to be in serious conflict and, to the extent that they are in dispute, it is the position of the tribe and the appellee that the disputes are not material. Apparently, the majority is inclined to agree.

My concern, however, is that it has long been the policy of this Board not to decide cases on the basis of a record that has such a deficiency of specific facts that we cannot really tell what happened, or when or why, regardless of the apparent weight of the law on one side or the other. Unlike my colleagues, I think that this is such a case. My recollection is that as many as 300 homeowners may be involved here. Among other things, before deciding this case, I would like to know to what extent the Hawley Lake Homeowners' Association is really the legal representative of each of these homeowners. I would like to know how many homeowners relied upon the tribe's representations as to lease renewal at the time the leases were entered into, and why they did so; and to know in greater detail what subsequently happened between the tribe and the homeowners, particularly when Resolution No. 69-68 was first passed and later rescinded.

Which and how many homeowners were materially affected? Did they justifiably rely on this resolution and, if so, to what extent and in what manner? What was BIA's role during these negotiations? Did it approve the original leases knowing of the tribe's representations as to renewal? What was its role with respect to Resolution No. 69-68? If it approved the original leases and did not take issue with the tribe's representations as to renewal, did that constitute Secretarial approbation of the right to renew sufficient for the homeowners to rely on it? In what capacity did the tribe originally offer the leases to the homeowners? If they were offered in the tribe's proprietary capacity, can the tribe now disavow its agent's actions simply on the basis of a claim of sovereign immunity? Finally, how does the statute of limitations fit into this picture?

I would guess that in some cases the homeowners did rely to their detriment upon the tribe's representations, and that in some cases they did not. Thus, I think the Board is entitled to the specific facts in the matter, not merely to general allegations by the homeowners and general demurrers by the tribe. In fairness to the homeowners' association, it expressly requested an evidentiary hearing precisely in order to show exactly what happened. I agree. I think the Board needs the whole story in order to ensure its own integrity, independently of any statutory or procedural requirements of due process. In my view, requiring an evidentiary hearing is clearly more consistent with what the Board has done in the past--and with what the courts have generally expected of Federal agencies--than the present decision of the Board seeking an opportunity to decide the matter on purely legal grounds. I therefore dissent.

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Bernard V. Parrette  
Chief Administrative Judge